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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 574

WILLIAM E. WARD, PETITIONER

v.

CHARLES S. THOMAS, SECRETARY OF THE DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 15–22) is reported at 225 F. 2d 953.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1955 (Pet. App. 15). A petition for a rehearing *en banc* was denied on September 23, 1955 (Pet. App. 23). The petition

for a writ of certiorari was filed on December 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioner was removed from his position in the classified civil service for causes related to the conduct of his official duties. The procedures followed fully conformed to the provisions of the Lloyd-LaFollette Act of 1912.

The question presented is whether the Performance Rating Act of 1950 precludes removal for improper conduct of official duties when the employee's performance rating, based upon his over-all performance during the relevant rating period, was "satisfactory."

STATUTES INVOLVED

Section 6 of the Performance Rating Act of 1950, 64 Stat. 1099, 5 U. S. C. 2005, provides in relevant part as follows:

> Each performance-rating plan shall provide for rating representing at least * * * (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; * * *. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

Section 6 of the Lloyd-LaFollette Act of 1912, 37 Stat. 555, as amended, 5 U. S. C. 652, provides in pertinent part:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. * * *

STATEMENT

Petitioner, a non-veteran, held a position in the classified civil service as a Personnel Officer at the Marine Corps Air Station, Cherry Point, North Carolina (R. 1). On May 11, 1951, he was served with a written notice of charges, looking to his removal from his position, pursuant to the provisions of the Lloyd-LaFollette Act, *supra*, this page (R. 10–13). On May 31, 1951, this notice was supplemented by the specification of over 40 instances reflecting the lack of professional knowledge and ability; the lack of supervisory ability; poor personnel management; per-

sonal disloyalty; the making of false statements, and the failure to carry out instructions (R. 18–29).

Petitioner took advantage of the reasonable opportunity afforded him to answer the charges and, on June 15 and 18, 1951, received a hearing (R. 4, 13–17, 30–40). On June 26, 1951, the Acting Commanding General of the Air Station advised petitioner in writing that the charges were deemed to have been proven and that he was being removed for unsatisfactory service, effective June 29, 1951 (R. 41–42). On June 30, 1951, petitioner appealed from this determination to the Under Secretary of the Navy (R. 44). On September 29, 1951, the Under Secretary, finding the charge of unsatisfactory service to be clearly established by the record, denied the appeal (R. 44–45).

On January 9, 1952, petitioner filed this action in the District Court, seeking an order declaring his removal illegal and directing his reinstatement R. 1–9). The complaint alleged (1) that the removal had been effected through fraud, bad faith and collusion on the part of certain supervisory officials and (2) that, since petitioner had a "satisfactory" performance rating, he could not be removed without the 90-day warning which Section 6 of the Performance Rating Act, *supra*, p. 2, requires as a condition to a performance rating of "unsatisfactory" (R. 5–7).

On motion of respondent, the District Court (Morris, J.) dismissed the complaint (R. 45–46).

The Court of Appeals reversed (208 F. 2d 48). With respect to the allegations of fraud, collusion and bad faith, the court agreed with the view of the District Court that they were insufficient to warrant judicial review on the merits of the administrative action (208 F. 2d at 49). Insofar as the alleged violation of the Performance Rating Act was concerned, however, the Court of Appeals ruled that the District Court should not have passed upon the applicability of the Act without a prior determination by the administrative agency involved (208 F. 2d at 50). Accordingly, the cause was remanded with instructions to provide adequate opportunity for an administrative determination on this question (*ibid.*).

In compliance with an order of the District Court following the remand, the Department of the Navy submitted a report on June 14, 1954, in which it concluded that petitioner's removal could be effected under the Lloyd-LaFollette Act without observance of the provisions of the Performance Rating Act (R. 47–49). On July 12, 1955, the District Court (Holtzoff, J.), disagreeing with this conclusion, granted summary judgment to petitioner and directed his restoration to his position in the classified civil service (R. 49–50).

On August 18, 1955, the Court of Appeals reversed and remanded with instructions to dismiss the complaint (Pet. App. 15–22). The court observed (1) that neither the applicable

statutes nor the legislative history of the 1950 Act supported petitioner's position that a "satisfactory" performance rating precludes a dismissal for a cause which relates to the employee's performance of his official duties; (2) that an "unsatisfactory" performance rating may justify lesser personnel action than removal; and (3) that, by the same token, a "satisfactory" performance rating based upon the employee's overall performance during the rating period does not preclude the possibility of his being guilty of conduct in the execution of his duties, either in particular instances or in a particular aspect of his position, which would justify removal under the Lloyd-LaFollette Act (Pet. App. 18–20). The court then concluded (Pet. App. 21):

> The administrative ruling made by the Navy Department in this case represents an attempt to balance and reconcile [these considerations], based not only on theoretical fairness but on practical experience. We cannot say that the ruling is either unreasonable or outside the compass of the statutes involved.

On September 23, 1955, a petition for a rehearing *en banc* was denied (Pet. App. 23).

ARGUMENT

The removal of petitioner from his position in the classified civil service was indisputably effected in full compliance with the requirements

of the Lloyd-LaFollette Act.[1] The formal charges, and the particulars supplied at petitioner's request, detailed numerous, specific instances of inadequate performance and misconduct, and petitioner was afforded sufficient opportunity to file a written answer thereto. He did so. Thereafter, he received a full hearing, followed by review by the Under Secretary of the Navy. Since, as the Court of Appeals correctly held, nothing in the Performance Rating Act of 1950 or its legislative history dictates the conclusion that this statute was intended to limit discharges for cause under the Lloyd-LaFollette Act, petitioner has no legitimate basis for complaint. Accordingly, further review is not warranted.

1. As the Court of Appeals observed (Pet. App. 18), Section 6 of the Performance Rating Act, upon which petitioner relies, does not expressly limit discharges for cause under the Lloyd-LaFollette Act. The section provides simply that no employee may be given an "unsatisfactory" performance rating, which shall serve as *a* basis

[1] Petitioner's assertion (Pet. 7) that he was not removed under the Lloyd-LaFollette Act is frivolous. Contrary to his seeming belief, there is, of course, no requirement that either the written notice of charges or the notification of removal contain a specific reference to the Act. And, while the notice of charges may have been couched in terms of petitioner's "unsatisfactory service" (R. 10), there is no room for doubt that the charges, if true, constituted "such cause as will promote the efficiency of [the classified civil] service" within the meaning of the Act.

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for removal, without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance. What petitioner seeks is to read into this provision an additional stipulation that a "satisfactory" performance rating absolutely precludes discharge for any cause which relates to the employee's execution of his official duties.

If Congress had proposed, by Section 6 of the Performance Rating Act, to compel a basic change in the requirements of the Lloyd-LaFollette Act and in the procedures long followed in its administration, it assuredly would have employed language more appropriate to that end.[2] This conclusion is inescapable in light of the history of performance ratings in the Federal Government (a history with which Congress was thoroughly

[2] While petitioner invokes solely Section 6 of the Performance Rating Act, it may be noted in passing that nothing in any of the other sections lends support to his position. Indeed, when the Act is read as a whole, it is seen that, unlike the Lloyd-LaFollette Act, it is not addressed to the removal of employees in the classified civil service. Section 3 (5 U. S. C. 2002), for example, states that the performance rating plans to be established by each department are "[f]or the purpose of recognizing the merits of officers and employees, and their contributions to efficiency and economy in the Federal service." Section 5 (5 U. S. C. 2004) stipulates that each plan shall provide, *inter alia*, for the use of appraisals to improve the effectiveness of employee performance and for strengthening supervisor-employee relationships. And Section 9 (a) amended Section 701 of the Classification Act of 1949, 5 U. S. C. 1121, to condition step-increases in compensation upon a current performance rating of "satisfactory" or better.

familiar, as is evident from the relevant committee reports) [3] and the legislative history of the Performance Rating Act.

Neither performance ratings, nor personnel action based thereon, were innovations of the Performance Rating Act. Indeed, the first Congressional action in this sphere preceded by one day the Lloyd-LaFollette Act. By Section 4 of the Act of August 23, 1912, 37 Stat. 413, the Civil Service Commission was directed to establish a system of efficiency ratings for the classified service within the District of Columbia. The Act declared that the system was to provide minimum ratings of efficiency for the purposes of promotion, demotion and *dismissal for inefficiency.*

By Section 9 of the Classification Act of 1923, 42 Stat. 1490–1491, the creation of a Personnel Classification Board was authorized, for the purpose of reviewing and revising uniform systems. The Act further provided that the Board was to establish rating levels for salary advancements within grade, for continuation of existing rates of compensation, for reduction in pay within grade and for *dismissal.*

The 1923 Act, as amended, was repealed by Title IX of the Classification Act of October 28, 1949, 63 Stat. 970. The latter Act called for the establishment by the Civil Service Commission of uniform systems of efficiency ratings for offi-

[3] See S. Rept. 2265, 81st Cong., 2d Sess., pp. 5–8; H. Rept. 2162, 81st Cong., 2d Sess., pp. 13–16.

cers and employees in the classes and grades provided therein. Like the 1923 Act, it specified that the systems should set forth degrees of efficiency constituting grounds, *inter alia,* for changes in the rate of the employee's compensation, as well as for removal from the position occupied or *dismissal* from the service.

While each of these statutes, in common with the Performance Rating Act, thus provided that an unsatisfactory efficiency rating was to serve as *a* basis for removal, none of them contained any restriction upon the removal of an employee under the Lloyd-LaFollette Act for inefficiency or otherwise unsatisfactory service. And the discussion on the floor of the Senate in connection with the Classification Act of 1923 clearly indicates that no such restriction was intended. Asked specifically whether it would have an effect upon the dismissal provisions of the Lloyd-LaFollette Act, Senator Sterling, the author of the committee report on the bill,[4] responded in the negative (64 Cong. Rec. 5110).

Administratively, the Civil Service Commission had consistently taken the position for many years, both in regulations and in accompanying instructions, that compliance with the procedural requirements of the Lloyd-LaFollette Act was the single condition precedent to removal

[4] S. Rept. 486, 67th Cong., 2d Sess.

of a non-veteran for inefficiency.[5] It was also the Commission which instituted (as of November 24, 1947) the requirement of a warning period of from three to six months prior to the *rating* of an employee as "unsatisfactory." See *Federal Personnel Manual*, p. E 1–15. This practice, in relation to rating, was noted in the report of the House Committee on Post Office and Civil Service in connection with the bill which became the Performance Rating Act, the committee stating its belief that the requirement of a warning should be incorporated into the Act. See H. Rept. 2162, 81st Cong., 2d Sess., p. 2.

The legislative hearings similarly show that there was no purpose to alter the requirements of the Lloyd-LaFollette Act or the procedures traditionally followed under that statute. As pointed out by the court below (Pet. App. 19),

[5] See *e. g.*, 5 C. F. R. 9.102 (1949 ed.) and *Federal Personnel Manual*, pp. S 1–14, S 1–20—1–23. Section 9.102, the regulation dealing with the procedure to be followed in removing permanent and indefinite employees, was grounded upon the provisions of the Lloyd-LaFollette Act. The instructions in the *Federal Personnel Manual* were to the effect that discharges for inefficiency were governed by Section 9.102 alone. And that portion of the Manual (p. E1–25) concerned with efficiency ratings stipulated merely that an employee whose rating was "unsatisfactory" was not to be permitted to remain in his position but was to be separated, reassigned or demoted. See, also, Civil Service Commission Departmental Circular No. 634, July 21, 1950, p. 2.

As noted in point 3, *infra*, pp. 15–17, the Commission has taken the same position since passage of the Performance Rating Act.

Chairman Mitchell of the Civil Service Commission indicated that while both the presentation of charges and the granting of an "unsatisfactory" rating were available as means of dismissing an inefficient employee, the former was the appropriate method.[6] This view was concurred in by Commissioner Perkins, who elaborated upon the administrative difficulties attaching to the use of an "unsatisfactory" rating as the basis for dismissal.[7] Additionally, the President of the National Federation of Federal Employees, in objecting to what he deemed the "improper" use of efficiency rating systems to remove employees, stated his understanding that "there is a means provided, and has been in existence since the

[6] See Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d Sess., on H. R. 7264 (A Bill to Authorize the Establishment of Methods for the Evaluation of the Performance of Work of Federal Employees, and For Other Purposes), and on H. R. 7824 (A Bill to Provide for the Administration of Performance-Rating Plans for Certain Officers and Employees of the Federal Government, and For Other Purposes), p. 4.

[7] *Id.*, pp 9, 68–69. As Commissioner Perkins noted, past experience revealed that removal action based upon the employee's efficiency rating, rather than upon the preferment of charges, frequently resulted in appreciable delays in the separation of inefficient personnel. Presumably, in the case of veterans the delays were of even greater magnitude by reason of the requirement in Section 14 of the Veterans Preference Act, 58 Stat. 390, as amended, 5 U. S. C. 863, that the preference eligible be given thirty days advance notice of proposed discharge, as well as a hearing before the Civil Service Commission on review of an adverse agency determination.

[Lloyd-LaFollette Act], whereby inefficiency or incompetency can be made the subject of the preferment of charges and the employee be required to answer those charges, to show cause why he or she should not be demoted or dismissed because of lack of competency or lack of efficiency."[8]

The short of the matter is that, for present purposes, the Performance Rating Act changed existing law in but a single respect, and then only by the codification of an established administrative practice confined to the rating system. In these circumstances, it is difficult to see how it can seriously be suggested that, without saying so, Congress intended the Performance Rating Act to have much more sweeping consequences, *i. e.*, to operate as a drastic limitation upon the long-exercised and hitherto unchallenged power of the Executive to proceed under the Lloyd-LaFollette Act in removing employees because of demonstrable, unsatisfactory performance of their duties.

2. Ignoring the contemporaneous legislative history, petitioner attempts to find support in subsequent history, *i. e.*, in a report of the House Subcommittee on the Federal Civil Service dealing with the general subject of performance ratings, written almost four years after passage of the Performance Rating Act.[9] Thus, he relies on certain statements in the report purportedly

[8] *Id.*, p. 34.

[9] H. Rept. 2277, 83d Cong., 2d Sess., dated July 19, 1954.

evincing the Subcommittee's belief that the Performance Rating Act is to be applied where removal is based upon job performance (Pet., pp. 8–10). This reliance is, however, misplaced. For one thing, the Subcommittee made it equally clear that it was not "condemning the use of the provisions of either the Lloyd-LaFollette Act or section 14 of the Veterans' Preference Act to discharge undesirable workers," and that it "recognize[d] the necessity for just such an administrative authority as these acts provide."[10] Moreover, as this Court noted in *Fogarty* v. *United States,* 340 U. S. 8, 13–14, subsequent legislative events cannot be invoked to supplant the contemporaneous intent of the Congress which enacted the particular legislation under consideration. See, also, *United States* v. *Mine Workers,* 330 U. S. 258, 281–282.[11]

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[10] *Id.*, p. 11.

[11] One of the salutary reasons for this rule is seen from an examination into the composition of the Subcommittee which rendered the report upon which petitioner relies. Four of the seven members (Messrs. Harden, Cole, Cretella, and Moss) were not on the Committee on Post Office and Civil Service when the hearings were held on the Performance Rating Act. In fact, Messrs. Cretella and Moss were not then members of the Congress.

It is also noteworthy that the Subcommittee was of the erroneous impression that, on the prior appeal, the court below had held Section 6 of the Performance Rating Act to be applicable to petitioner's removal. H. Rept. 2277, 83d Cong., 2d Sess., p. 10. This may well have influenced the views expressed in the report.

3. The administrative interpretation of the 1950 legislation, as well as the Commission's interpretation of the pertinent earlier statutes (see discussion, *supra,* pp. 10–11), supports the conclusion reached by the Court of Appeals. Cf. *United States* v. *Henning,* 344 U. S. 66, 75.

By Section 8 of the Performance Rating Act (5 U. S. C. 2007), the Commission was authorized to issue such regulations as might be necessary in the administration of the Act. The Commission was also directed to inspect and supervise the administration of the performance rating plans called for by Section 3 (5 U. S. C. 2002), and to revoke those which did not meet the requirements of the Act and the regulations promulgated thereunder.

Acting pursuant to this authority, the Commission approved the performance rating plan of the Department of the Navy, published on December 7, 1950. NCPI 130. Section 7–4 of this plan provided that an "employee who, after a full and fair trial, demonstrates a sustained performance that is clearly unsatisfactory, should be promptly reassigned, demoted or separated from employment, without regard to whether or not a performance rating has been made." The section added that "[d]emotion and separation will be made by the preferment of charges, in which specific instances of unsatisfactory work

performance shall be cited" and that "[s]uch charges may be preferred at any time."

The same view of the Performance Rating Act is expressed in the *Report on Performance Evaluation in the Federal Service,* issued in April 1953 by the Employee Development Committee of the Federal Personnel Council.[12] The report notes that (p. 6):

> * * * The Unsatisfactory rating provides a basis to be used as of a particular date (not less often than every 12 or 18 months) for separating an employee whose performance is below the minimum acceptable standards. Such a rating may be given only after a specific 90-day warning and is subject to two appeal procedures * * *. However, under the regulations of the Civil Service Commission, action may be initiated at any time to effect removals for unsatisfactory performance without the formality of an Unsatisfactory rating, and in such cases the procedures require no warning and provide no right of appeal for non-veteran employees other than that

[12] The function of the Federal Personnel Council is to study personnel policies and to make recommendations to the Civil Service Commission and to other agencies. Its members include the personnel directors of each federal agency, and representatives of the Civil Service Commission and of the Bureau of the Budget. See *69th Annual Report of the United States Civil Service Commission* (1951–52), p. 71.

which may be available under the agency's grievance procedure.[13]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys.

JANUARY 1956.

[13] The regulation referred to by the Council undoubtedly was 5 C. F. R. 9.102, see n. 5, *supra*, p. 11. While, since 1950, Section 9.102 has been amended in minor respects, it still grounds removal of non-veterans for inefficiency solely upon compliance with the provisions of the Lloyd-LaFollette Act. See 5 C. F. R. (1955 Supp.) 9.102. And, while the *Federal Personnel Manual* now calls for use of performance ratings as a *guide* to personnel actions such as salary increases, promotion, demotion, removal and reduction-in-force (see p. P–4–3), it does not suggest that removal may not be effected in the absence of an "unsatisfactory" performance rating.

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